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No. 77-1730

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN T. CLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for failure to file income tax returns for 1972 and 1973 on the grounds that the Information was filed in the wrong district and that he was the subject of selective prosecution.

After a non-jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted on two counts of willful failure to file income tax returns for 1972 and 1973, in violation of 26 U.S.C. 7203. The district court sentenced him to a one-year prison term on each count to run concurrently, 60 days of which was to be served and the balance suspended, followed by a four-year period of probation. The court also required petitioner to pay the costs of prosecution.

The charges against petitioner were set forth in an Information filed by the United States Attorney for the Western District of Washington. For more than 20 years petitioner had continuously maintained his legal residence in Spokane, Washington, which is located in the Eastern District of Washington. Prior to trial, petitioner moved to dismiss the Information for lack of jurisdiction, alleging that venue did not lie in the Western District of Washington. The district court treated petitioner's motion to dismiss as a motion to transfer venue to the Eastern District, which it granted pursuant to 18 U.S.C. 3237(b). Thereafter, petitioner renewed his motion to dismiss and additionally moved for a hearing to determine selective prosecution. The district court denied both motions and, after a trial, entered a general finding of guilt as to both counts (Pet. 3; Pet. App. B-1). The court of appeals affirmed (Pet. App. A).

1. The court of appeals correctly held that the information was properly filed in the Western District of Washington. A violation of 26 U.S.C. 7203 occurs in the judicial district in which a taxpayer is required to file his return. *United States* v. *Calhoun*, 566 F. 2d 969, 973 (C.A. 5). An individual taxpayer is required to file his income tax return in the internal revenue district of his legal residence or at the designated Regional Service Center for the district. 26 U.S.C. 6091(b)(1). The State of Washington constitutes one internal revenue district, with the district office being located in Seattle. 1 Int. Rev. Manual, Administration (CCH), par. 1119.3(47), p. 1153 (March 1978).

Petitioner's assertion (Pet. 4) that he could only be charged in the judicial district of either his residence (the Eastern District of Washington) or the Service Center (the District of Utah) ignores the plain language of Section 6091(b)(1)(A)(i) and (ii) (26 U.S.C.), which provides that the returns must be filed in the *internal revenue district* of taxpayer's legal residence or at the Service Center

encompassing that district. Accordingly, petitioner was required to file his returns at the District Office in Seattle (within the Western District of Washington), or at the Service Center in Ogden, Utah. Here, petitioner failed to file his returns at either the district office in Seattle or the Service Center in Ogden. This failure to file a return in either the Western District of Washington (where the district office was located) or in the district of Utah (where the Service Center was located) is an offense in both judicial districts; venue could therefore lie in either district. *United States* v. *Commerford*, 64 F. 2d 28, 32-33 (C.A. 2), certiorari denied, 289 U.S. 759; *Yarborough* v. *United States*, 230 F. 2d 56, 58 (C.A. 4), certiorari denied, 351 U.S. 969; see also *United States* v. *Anderson*, 328 U.S. 699. Since petitioner could have filed his returns at the district office in Seattle and failed to do so, venue was properly in the Western District of Washington.

2. Petitioner further contends (Pet. 4-5) that the district court erred in refusing to hold an evidentiary hearing on his assertion of selective prosecution. A defendant is entitled to an evidentiary hearing on a claim of selective prosecution only if he alleges sufficient facts to take the case past the frivolous stage. *United States* v. *Oaks*, 508 F. 2d 1403 (C.A. 9). But the only fact petitioner alleges in support of his claim is that he was a "tax protester." This allegation is of no consequence. Petitioner's status as a tax protester standing alone did not justify an evidentiary hearing nor insulate him from prosecution for failure to file tax returns.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

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